

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
September 16, 2009 Session

**IN RE ESTATE OF RICHARD CLAY HUMPHREYS**

**Appeal from the Chancery Court for Washington County  
No. P0134     G. Richard Johnson, Chancellor**

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**No. E2009-00114-COA-R3-CV - FILED OCTOBER 28, 2009**

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This appeal arises from the distribution of a decedent's estate ("the Estate"). After an evidentiary hearing, the trial court entered an Order to disburse the proceeds of the farm business on a partnership theory to the widow of the decedent. The decedent's son filed a motion requesting the trial court to reconsider the Order, and the trial court denied the motion. The son appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed; Case Remanded**

JOHN W. McCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and CHARLES D. SUSANO, JR., J., joined.

James D. Culp, Johnson City, Tennessee, for the Appellant, Richard A. Humphreys.

David W. Bush, Elizabethton, Tennessee, for the Appellee, Shelia K. Humphreys.

James R. Wheeler, Jonesborough, Tennessee, for the Appellee, Todd A. Humphreys, Administrator of the Estate of Richard Clay Humphreys.

**OPINION**

**I. BACKGROUND**

Richard Clay Humphreys ("Decedent") died intestate on March 8, 2007, at the age of sixty-two. Decedent was survived by four heirs at law including his wife, Shelia K. Humphreys ("Widow") and three children, Christie Smolenski, Richard A. Humphreys ("Son"), and Todd A. Humphreys, who is also the Administrator of the Estate.

Decedent was a farmer his entire life, and he inherited the farm from his father. Decedent and Widow lived on the farm during their entire 42 years of marriage. The farm expanded during their marriage, and at the time of Decedent's death, the farm consisted of approximately 1,000 acres.

A majority of the farm land was leased by Decedent and Widow, but of the non-leased farm land, approximately 197 acres were titled in Decedent's name. Decedent and Widow, as tenants by the entirety, acquired approximately 66 acres of the farm land over the course of their marriage, which was titled in their names. The farm was a large operation that included a dairy barn, cattle, and tobacco fields.

The Estate was probated in Washington County Chancery Court, and the trial court authorized an auction of the farm's cattle and equipment. After settling the debts of the farm business, the net proceeds of the auction were approximately \$671,000.00. The Estate moved to disburse fifty percent of the auction proceeds to Widow on a partnership theory leaving the remaining fifty percent to the Estate.

The trial court conducted an evidentiary hearing on the Estate's motion to disburse the auction proceeds; Son was the only heir to object to the distribution to Widow on a partnership theory. At the hearing, all of the heirs and a number of disinterested witnesses testified about the operation of the farm. Considering the totality of the circumstances, the trial court concluded that Decedent and Widow operated the farm business as partners. The trial court found that Widow "engaged in all manner of work" ranging from mowing, painting, and cleaning. As a result, the trial court entered an Order disbursing fifty percent of the net proceeds from the auction to Widow as the surviving partner and the remaining fifty percent to the Estate.

Son filed a motion requesting the trial court to reconsider its Order. In that motion, Son raised the same issues that he raises on this appeal. The trial court denied the motion on May 13, 2008 and closed the Estate on December 23, 2008. Son filed a timely notice of appeal.

## II. ISSUES

The issues presented for review have been restated as follows:

- A. Whether the trial court applied the correct standard of proof when making the determination that a partnership existed between Decedent and Widow.
- B. Whether the trial court erred by concluding that Decedent and Widow intended to operate the farm as a partnership.
- C. Whether the trial court erred in sustaining Widow's Dead Man's Statute and hearsay objection.

## III. STANDARD OF REVIEW

In implied partnership cases, the burden of proof is clear and convincing. The party alleging the existence of an implied partnership “carries the burden of proof of that fact by clear and convincing evidence.” *See Montgomery v. Montgomery*, 181 S.W.3d 720, 726 (Tenn. Ct. App. 2005); *Story v. Lanier*, 166 S.W.3d 167, 175 (Tenn. Ct. App. 2004). To determine what constitutes a partnership is generally a “matter of law, but whether a partnership exists under conflicting evidence is one of fact.” *Messer Grieshiem Indus., Inc. v. Cryotech of Kingsport, Inc.*, 45 S.W.3d 588, 605 (Tenn. Ct. App. 2001) (quoting *Wyatt v. Brown*, 281 S.W.2d 64, 68 (Tenn. Ct. App. 1955)).

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On appeal, the findings of fact of a trial court sitting without a jury are reviewed *de novo* with a presumption of correctness. Tenn. R. App. P. 13. The court will not disturb the trial court’s findings of fact “unless the preponderance of the evidence is otherwise.” *Id.* However, the trial court’s conclusions of law are reviewed *de novo* with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

#### IV. ANALYSIS

##### A.

\_\_\_\_ Son contends that the trial court did not apply the correct standard of proof when determining whether a partnership existed between Decedent and Widow. He claims that the trial court did not directly state in its Opinion that it applied the clear and convincing standard, and he asserts the facts of the instant case do not clearly and convincingly demonstrate that a partnership existed.

\_\_\_\_ The Estate and Widow do not dispute that the appropriate standard of proof for implied partnership cases is clear and convincing. In fact, they point to the trial court’s Order on Son’s motion to reconsider; in the Order, the trial court unequivocally states that the clear and convincing standard was used. It provides:

Specifically, the Court finds that the Court was unaware that it was unclear that the Court used the clear and convincing standard in reaching the conclusions in the Order from the 11<sup>th</sup> day of December, 2007. No other standard but clear and convincing was argued at the hearing, and the Court’s attention was directed by the Movant to the fact that the appropriate standard was clear and convincing evidence and all parties appear to be under the same understanding that the clear and convincing standard applied in the establishment of an implied partnership. The Court applied the clear and convincing standard in its ruling at the December 11, 2007, hearing[.]

As stated above, the person alleging the existence of a partnership must establish it by clear and convincing evidence. *See Montgomery*, 181 S.W.3d at 726. The clear and convincing standard is “more exacting than the preponderance of the evidence standard, [but] it does not require such certainty as the beyond a reasonable doubt standard.” *Hughes v. Bd. of Prof’l Responsibility of Supreme Court of Tennessee*, 259 S.W.3d 631, 642 (Tenn. 2008). As explained by the Tennessee Supreme Court in *Hughes*,

Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations sought to be established.

*Id.* (quoting *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995)).

According to Son, the facts of this case do not support a finding of an implied partnership, and at best, the trial court utilized the preponderance of the evidence standard. However, after reviewing the record, we must disagree. The trial court clearly indicated that it held by clear and convincing evidence that an implied partnership existed. Although not directly stated in the trial court's initial Opinion, nothing in the record contradicts the trial court's subsequent Order explaining that the clear and convincing standard of proof was used in reaching the ultimate conclusion. Therefore, we hold that the trial court applied the appropriate standard of proof, clear and convincing evidence, when determining that a partnership existed between Decedent and Widow.

#### B.

\_\_\_\_\_ Son contends that the trial court erred by concluding that Decedent and Widow intended to operate the farm as a partnership. Son asserts that Decedent never intended to form a partnership with Widow. Specifically, Son argues that an implied partnership did not exist because Decedent (1) owned the bank account for the farm's operation; (2) made all the important decisions for the operation of the farm including the purchase and sale of cattle, the purchase of supplies, and medical treatment of livestock; (3) titled all the farm vehicles in his name; and (4) filed joint tax returns with Widow including a Schedule F form that listed Decedent's name as the proprietor of the farm.

\_\_\_\_\_ A partnership is "an association of two (2) or more persons to carry on as co-owners of a business or other undertaking for profit. . . ." Tenn. Code Ann. § 61-1-101(6) (2002). The sharing of profits raises the presumption that a partnership exists. *See* Tenn. Code Ann. § 61-1-202 (c)(3) (2002). To determine whether a partnership exists, courts must discern the intention of the parties. *Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991). Without a formal partnership agreement, the controlling intention is that which is deducible from the parties' actions. *Wyatt*, 281 S.W.2d at 67. It is not necessary that the parties intend to become partners, nor is it essential that the parties have an understanding of the legal effect of their actions. *Roberts v. Lebanon Appliance Serv. Co.*, 779 S.W.2d 793, 795-96 (Tenn. 1989); *see also Bass*, 814 S.W.2d at 41. It is the intent to do things "which in law constitutes a partnership," and as a result, the parties become partners regardless of their purpose "to create or avoid the relationship." *Roberts*, 779 S.W.2d at 796. Thus, a partnership exists when it appears from the circumstances that the parties combined "their time, labor, skills, and assets in a business enterprise to produce a profit." *Bass*, 814 S.W.2d at 44.

Although Son admits that Widow worked on the farm, he claims that because she worked under Decedent's direction, an implied partnership cannot be found. He also argues that Widow's work on the farm was a part of a longstanding tradition where farm wives aid their husbands.

In response, the Estate and Widow contend that the trial court correctly concluded that a partnership existed between Decedent and Widow considering the totality of the circumstances. They point to witness testimony that supports the finding that Decedent and Widow pooled their resources for the operation of the farm. The testimony at the hearing included family members and disinterested witnesses, all of whom testified to Widow's constant involvement in the farm's operation. Doug Fox, a neighbor, testified that Widow was the "upkeep" of the farm asserting that "she stayed busy." Mr. Fox also testified that Widow worked with the calves, painted the fences and the milkhouse, and cleaned all of the farm vehicles and clothing. Bynum Humphreys, Decedent's uncle, testified that Widow was the "workingest woman in Washington County." Additionally, Gary Edwards, former pastor to the couple, attested to Widow's contribution to the farm. He testified that Widow performed various tasks ranging from gathering ground leaves in the tobacco fields to mowing the property.

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Although Son uses the Schedule F of Decedent's tax return as proof that a partnership did not exist, a closer review of the record indicates otherwise. Jane Hawkins, a certified public accountant, prepared the income tax returns for Decedent and Widow for eight years. Ms. Hawkins testified that it was only possible to list one name on the Schedule F form that was a part of Decedent and Widow's joint tax return. She revealed that the Schedule F form included Widow's assets as well as Decedent's assets, and she explained that it was a fairly common practice to combine the incomes of farm couples on the Schedule F even though the form only listed one name.

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In light of the above proof, the trial court properly held by clear and convincing evidence that a partnership existed between Decedent and Widow. The central issue is whether Decedent and Widow intended to combine their resources, labor, time, and skill for the operation of the farm, and by doing so, created an implied partnership. The facts of the instant case indicate so. Therefore, it is immaterial whether Decedent wanted or intended to enter into a partnership with Widow as Son claims. The key is whether Decedent intended to combine his efforts with Widow for the undertaking of the farm. The hearing testimony illuminates the fact that Widow worked on the farm, contributing considerable amounts of time and labor. Unlike Son, who also worked on the farm, Widow did not receive a salary for the work she contributed to the farm. Thus, Widow's work on the farm cannot be diminished to merely helping out as a part of a tradition, but it appears that Widow worked alongside her husband to maintain a large farming operation. As Our Supreme Court observed in *Bass*, the "social relationship" of the parties has no bearing on determining whether an implied partnership existed. *Bass*, 814 S.W.2d at 44. Accordingly, we affirm and hold that the trial court did not err by concluding that a partnership existed.

C.

\_\_\_\_ Son argues that the trial court erred by sustaining the Dead Man's Statute and hearsay objection during Widow's testimony. Widow, Son claims, testified in her deposition that Decedent wanted Son to take over the farm after he died, and Son wanted to impeach her credibility because she provided a different answer during the hearing. According to Son, the trial court should not have sustained the objection because Widow's counsel made an untimely objection; the Dead Man's statute is inapplicable to Widow's testimony; and Widow's answer to the question did not violate the hearsay rule.

\_\_\_\_ The Estate and Widow counter that Son's question was irrelevant and hearsay. Specifically, they characterize the question as vague with "no applicable time frame reference" and fails to fall "within the purview" of Tennessee Rule of Evidence 803(3). Irrespective of the admissibility of the question, Son failed to make an offer of proof at the time of the objection. According to the Estate and Widow, the failure to make an offer of proof means that this issue does not appear properly before the court pursuant to Tennessee Rule of Evidence 103. Alternatively, if the trial court did err by sustaining the objection, it was harmless error in view of the overwhelming evidence supporting the finding that a partnership existed between Decedent and Widow.

After reviewing the record, we will not reach the merits of Son's contention because no offer of proof was made. *See* Tenn. R. Evid. 103(a)(2). There are multiple ways to make an offer of proof, and "if the excluded evidence is oral, counsel may summarize for the court either orally or in writing the content of the excluded evidence." Neil P. Cohen et al., TENNESSEE LAW OF EVIDENCE § 1.03[5][d] (4th ed. 2008). The Tennessee Supreme Court strongly suggests that when making an offer of proof, counsel present the proof itself. *See Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 804 (Tenn. 1975). On appeal, our review is "frustrated if the official record fails to contain the evidence which is the object of appellate scrutiny." TENNESSEE LAW OF EVIDENCE § 1.03 [6][e]. Thus, the party appealing the exclusion of evidence must have made an offer of proof; an offer of proof enables the appellate court to determine whether the trial court's exclusion of the evidence was reversible error. *Dossett v. City of Kingsport*, 258 S.W.3d 139, 145 (Tenn. Ct. App. 2007). When a party fails to make an offer of proof, this court will not consider whether the evidence should have been excluded. *Id.* Son failed to make an offer of proof summarizing the sought testimony from Widow. There is nothing in the record for this court to review. Therefore, we hold that the issue is waived.

## V. CONCLUSION

The judgment of the trial court is affirmed. Costs on appeal are taxed to the Appellant, Richard A. Humphreys. This case is remanded for collection of costs assessed below, pursuant to applicable law.

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JOHN W. McCLARTY, JUDGE